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No. _____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Republican Party of Alaska,
Petitioner,

vs.

Michael O'Callaghan, Jed Whittaker, Robert Gigler,
Alaskan Voters for an Open Primary, and State of Alaska,
Lieutenant Governor Jack Coghill, in his
official capacity as Lieutenant Governor,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Alaska

BRIEF IN OPPOSITION

Michael O'Callaghan
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Anchorage, Alaska 99501
(907) 277-8889
Respondent

July 5, 1996

QUESTIONS PRESENTED

1. The constitutionality of a blanket primary.

2. Timeliness of adjudicating election issues.

3. Factual errors in Alaska Supreme Court Opinion 4338 issued April 12, 1996.

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Alaska Statute Sec. 15.15.010. General Administrative Supervision by Director.

Alaska Statute Sec. 15.25.010. Provision for primary election. Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

Alaska Statute Sec. 15.60.010 (3). Definitions. "Director" means the director of elections who is the chief election officer of the state appointed in accordance with AS 15.10.105(a).

HISTORY OF THE CASE

The Appellant, Michael O'Callaghan, went to the polls on September 8, 1992 to vote in the primary of the state of Alaska. He was asked to declare party affiliation prior to receiving a ballot. He received a ballot with only Republican candidates. On September 17, 1992 the Appellant filed a complaint alleging numerous violations of Alaska statute. (Record Page 1-3)

Also on September 17, 1992 he filed a motion for expedited consideration which was denied on October 2, 1992. (Record Page 5)

On September 29, 1992 he filed a motion *Quo Warranto* with the Superior Court which has never been answered. (Record Page 5)

The Appellant also filed another motion for expedited consideration on October 22, 1992 which was denied November 2, 1992. (Record Page 7-8)

O'Callaghan filed case 3AN-92-11150 on November 12, 1992 challenging the legality of the 1992 general election.

The State moved for expedited consideration on December 17, 1992 which the Judge never acted upon.

Case 3AN-92-11150 was consolidated with the case at bar on April 13, 1993.

On May 26, 1993 the Appellant filed a motion to admit evidence based on Judge Shortell's order (Record Page 33-34) rejecting the Appellant's motion for a summary judgment November 6, 1992. (Record 37-42) Judge Shortell never admitted the evidence.

On November 16, 1993 the Appellant asked for a motion to amend based on the allegations that the primary

violated the Federal Voters Rights Act (42 U.S.C. 1973c). (Record Page 230) This motion was denied January 25, 1994.

16 months after O'Callaghan's complaint was filed, Judge Shortell granted the State's motion for summary judgment on January 25, 1994 (Record Page 234) and the Appellant began a merit appeal based on a violation of civil rights to the Supreme Court of the State of Alaska.

STATEMENT OF THE CASE

O'Callaghan appealed the Superior Court decision to the State of Alaska Supreme Court on February 24, 1994.

The court was petitioned for expedited consideration with the appeal. O'Callaghan was denied expedited consideration. The court was also petitioned for expedited consideration on an emergency motion filed June 23, 1994 by intervenor Whittaker. A decision was desired prior to the 1994 Primary. This petition was also denied.

A preliminary decision was received on February 3, 1995 (888 P.2d 1302). This decision was not complete. The court said,

> [W]e found that the briefing was inadequate to determine the constitutionality of the blanket primary and ordered additional briefing. In view of the importance of this case we invited participation by the political parties of Alaska and others.

O'Callaghan objected in his motion for reconsideration which was denied.

A final opinion was produced on March 20, 1996, then withdrawn in favor of a substitute opinion of April 12, 1996.

In its opinion, the Alaska Supreme Court declared the 1992 and 1994 official state primary election ballots illegal. Unprecedented in the history of the United States.

Kenneth Jacobus then began his appeal to the United States Supreme Court.

PRESENTATION OF FEDERAL QUESTION

The federal questions of due process and equal protection, protected by the U.S. Constitution, were raised by Michael O'Callaghan in his original complaint. (R PP 1&3) These issues were raised once again with appeal to the State of Alaska Supreme Court. (R PP 235) (February 24, 1994)

REASONS FOR GRANTING WRIT

O'Callaghan does not oppose the granting of the Writ for it poses a question of inalienable rights as defined by our constitution, courts and legislatures.

O'Callaghan wants to notice the Court of a 1967 Alaskan legislative delineated right:

> The right to vote for candidates of their choice without regard to party affiliation in the primary election. (§ 1 ch 1 SLA 1967) Alaska Statute 15.25.010

The Court is aware it has the authority to diminish rights when there is a compelling need. No court has the authority to extinguish any right. Thus the outcome of this appeal can only be an upholding of Alaskans right to vote for candidates of their choice.

O'Callaghan chooses to take issue with a number of incorrect statements by the petitioner Kenneth Jacobus.

First, if the court chooses to grant certiorari, I pray it would not allow the Republican party to be the named appellant. "The Republican party is not a legal entity; it is an amorphous group of individuals that acts and can only act through persons." Shirely v. U.S.A., (359 US 255).

The Republican party has no rights, only persons have rights. The incorrect naming has caused great confusion in this case. The proper name for the appellant is Kenneth Jacobus, not the Republican party.

Second, the U.S. District Court did not make a tentative decision in Zwacki v. State, D92-414 CV (D. Alaska 1992). Petitioner's petition for certiorari pp. 8, 13 and 14. The district court issued a "preliminary conclusion that the lieutenant governor has the authority to promulgate regulations." That conclusion is factually incorrect.

The Lieutenant Governor has no authority to promulgate regulations. Only the Director of Elections has the authority to adopt election regulations (see Alaska Statute 15.15.010) and definition of Director (Alaska Statute 15.60.010[3]). The Legislature in 1980 removed the Lieutenant Governor as head of elections and replaced him/her with a Director of Elections.

The appellee admitted the Director, not the Lieutenant Governor, adopted the emergency regulations. This shows the Lieutenant Governor did not adopt the closed primary because he did not have the authority. Federal District Court Judge Singleton was simply incorrect with his preliminary finding that, "The Lt. Governor has the authority to promulgate regulations." Clearly, the Lieutenant Governor has no authority to promulgate regulations.

Additionally, Judge Singleton of U.S. District Court, while dismissing the case without prejudice, said on July 9, 1992 (Record 260-61):

> And I think everyone understands too, that the United States is not a party to this case and one of the things I did not want to do was give an opinion, advisory, tentative or otherwise...

There was no tentative decision by the district court.

O'Callaghan also takes mathematical issue with counsel. Jacobus' allegations of "...the state requires the RPA (Republican Party of Alaska) to accept registered political opponents as voters in its primary election." (Petition at p. 11) is mathematically flawed. First, the primary is not any political party's primary election. The primary election is for all voters in the state. The State of Alaska runs the election and pays for it. It is the state's election, not a political party's election. Additionally, almost 50% of Alaska's voters choose no party affiliation. It is these voters without party affiliation who determine which political party's candidates advance to the general election, not the political party members. It is not statistically possible for an "enemy" political party possessing a total of only 20% of the registered voters, to cross over and nominate a weaker primary opponent. It is the 50% non-affiliates who mathematically determine the primary winners, not the parties themselves.

The closed primary caused a dramatic drop in voter participation. In 1990, with a blanket primary 50.8% of the registered voters chose to vote. When the primaries were closed in 1992, 41.8% of the voters participated and in 1994, 32.1% of the voters chose to exercise that right. The closed

primary violates everyone's "right to vote for candidates of their choice" and diminishes voter participation.

THE QUESTIONS ON APPEAL

I. THE CONSTITUTIONALITY OF THE BLANKET PRIMARY

This issue was created by the Alaska Supreme Court. It was never raised in the lower court or by any party on appeal.

Extensive research led to the conclusion that it is a non-issue. Never in the history of any state or U.S. judicial proceedings has any primary type been overturned for any reason. The challenge to all parties was to find any case where such had been the outcome. No party could site such a case. The blanket primary is constitutional. However, the court's creation of a new point on appeal is highly unusual, and its inviting adverse parties to join has clearly violated my U.S. constitutionally protected rights of due process and equal protection.

II. TIMELINESS OF ADJUDICATION OF ELECTION ISSUES

The second issue is timeliness. With O'Callaghan, the Alaska Supreme Court has been in continual egregious error. See O'Callaghan v. State of Alaska, Hickel, Coghill, Campbell, Alaska Supreme Court Opinion 4368 (filed November 23, 1992) issued July 5, 1996, and O'Callaghan v. State, 826 P.2d 1132, cert. denied 506 US 860 (1992). A lack of timeliness has lead to a moot ruling on the issue of illegal

ballot access by the Governor and Lieutenant Governor in 1990 in Alaska Supreme Court S-6181. This opinion was issued on July 5, 1996, almost 6 years after the fact. Adjudication of election issues in a timely manner is essential to the preservation of a democracy. Of the 11 states I have researched, all have a statutorily mandated time frame for adjudicated.

Arizona Election Statute: 16-676, Time for Hearing Election Contest (A)..."The court shall set a time for the hearing of the contest, not later than **10 days**... (B)...**Five days** after the submission...court shall file its findings and immediately thereafter shall pronounce judgment..." (emphasis added)

Illinois Election Statute: 5/23-1.12a, Election Contest-Statewide-Timing and Finality of determination by Supreme Court. "The determination of the election contest shall be made **as soon as possible.**" (emphasis added)

5/23-1.10a, Election Contest-Statewide-**Final Decision by the Supreme Court**. "**Within 15 days** of the issuance of recommended findings of fact by a circuit judge..." (emphasis added)

California Election Statute: Election Contests §20068, Continuance; Judgment "The court shall continue in special session to hear and determine all issues arising in contested elections. After hearing the proofs and allegations of the parties and **within 10 days** after the submission thereof...and immediately thereafter shall pronounce judgment in the premises..." (emphasis added)

Washington Election Statute: Elections 29.04.030, Prevention and Correction of Election Frauds and Errors.

"An affidavit of an elector...must be filed...no later than the second Friday...and shall be heard **and finally disposed of by the court no later than five days after the filing thereof.**" (emphasis added)

Arkansas Election Statute: 7-5-807, Election Illegalities (a) "**...shall convene a special term at once** unless the regular term is in session or will convene in 30 days." (emphasis added)

Indiana Election Statute: 3-12-8-16, Trial of Contest Fixing Date - Notice - "The court shall fix a date within 20 days after the return day fixed in the notice to the contestee for the hearing of the contest." [P.L. 5 - 1986 & P.L. 10-1988 §157]

5-23-1.5a, Election Contest "...Time...Within 20 days of the filing of a petition of state election contest..."

Iowa Election Statute: Elections and Officers-Contests 60.5, Organization and Trial "The clerk of the court shall immediately after filing of the statement notify judges herein named and shall fix a day for the organization of the court **within three days**..." (emphasis added)

Delaware Election Statute: Contested Elections §5927, "The governor, whenever a notice of contest is served upon him, **shall immediately make proclamation convening such superior court** in special session..." (emphasis added)

Idaho Election Statute: Election-Contests 34-2011, Time for Trial - "The cause shall stand for trail at the expiration of thirty (30) days from the time of service..."

Oregon Election Statute: Elections 260.315, Court Proceedings... "A proceeding for **violation of an election law**

shall be advanced on the docket of the court upon request by any party..."

260.345, Complaints..."Any elector may file with any filing officer a written complaint alleging a violation of election law..."

"(3) Attorney General shall immediately examine the complaint...**within 48 hours**...notify the person who is the subject..." (emphasis added)

"(4) ...shall report the findings to the Attorney General and request prosecution."

Wisconsin Election Statute: 5.06, Compliance Review; Appeal

"(1) Whenever elector...believe that...the official to act with respect to any matter concerning nominations, qualifications of candidates or ballot preparation is contrary to law...the elector may file a written sworn compliant..."

"(2) A complaint is deemed disposed of...within **5 business days**" (emphasis added)

5.08, Petition For Enforcement

"If the District Attorney...fails to act within 15 days of the date of filing, the petitioner may file the same petition with the Attorney General, who may then commence the action."

It is the case in Alaska "sometimes".

"That opinion was issued on an expedited basis in light of the pressing need to print ballots." Vogler v. Miller, 660 P.2d 1192 (Alaska 1983).

All have a statutorily mandated time frame, Alaska being the exception.

When Governor Hickel lost to Governor Hammond in the primary of 1978, see 588 P.2d 256, the issue was decided

in Superior Court and Alaska Supreme Court well before the general election. The appellant has found that such is not the norm in Alaska courts. O'Callaghan has repeatedly asked the Superior and Supreme courts for expedited consideration on four different election issues O'Callaghan has litigated. O'Callaghan has been refused expedited consideration on all cases before Superior Court.

In light of the common law practice and aforementioned statutory mandation of shortened time frame for adjudication of election issues, the Alaska Court System is in egregious error. In California and Arizona, adjudication of election issues is mandated; 30 days in superior court and 10 days in supreme court. Alaska's courts have allowed 4 illegal ballots, 2 legislatures, congressmen and one governor to be illegally elected. These people illegally elected did not represent Alaskans. Such a delay extinguished the flame of democracy. There has been no timely remedy. The court has allowed illegal elections to take place and the court has chosen not to adjudicate in a timely manner, even knowing 11 states mandated by law rapid adjudication of election issues.

I pray that the Supreme Court of the United States mandate any state election involving congressmen be decided in any lower court within 30 days, and that any appeal to state supreme court or circuit court of appeals be decided within 20 days. Such an act would help resuscitate the flame of democracy.

III. FACTUAL ERRORS IN ALASKA SUPREME COURT OPINION 4338 ISSUED APRIL 12, 1996

The final issue on appeal deals with three factual errors in Alaska Supreme Court. Third opinion in O'Callaghan v. Coghill, 888 P.2d 1302.

All of these issues were addressed in the motion for rehearing filed in the Alaska Supreme Court on May 10, 1996.

A. The first factual error was on pages 4 and 5.

As discussed earlier, the court and the appellee were factually incorrect to propose Judge Singleton made a "tentative decision." Judge Singleton issued a preliminary conclusion which was factually incorrect.

B. The second factual error is the legality of the 1992 and 1994 general elections.

The Alaska Supreme Court's is in error by refusing to declare the 1992 and 1994 general elections illegal. The case numbers on appeal to the state court are 3AN-92-08552 CI and 3AN-92-11150 CI Consolidated. The second case was a separate action challenging the validity of the general election. These cases were consolidated by court order. O'Callaghan has never relinquished his challenge. Since the Alaska court declared the primary elections illegal, the general elections must have been illegal. A poison tree bears no good fruit. O'Callaghan prays that the Supreme Court of the United States invalidate the 1992 and 1994 general elections.

C. The third factual error is contained in footnote 21.

> "In the present case the appellant does not expressly seek to set aside an election. We therefore state no view as to whether or under

> what circumstances such relief might be available."

O'Callaghan prayed the elections be declared null and void and or illegal three times. Once in his original complaint (Record p. 2) "...that the election be declared null and void." The second time in O'Callaghan's opening brief filed September 27, 1995 p. 2 "The ballots I received in the primary and general should be found to be illegal...". Additionally, in O'Callaghan's appellate reply brief p. 10. "All four elections should be declared illegal."

Having clearly expressly sought to set aside four elections, I pray the Supreme Court of the United States declare under what circumstances such relief might be available. Another option might be a directional remand.

CONCLUSION

There are serious problems with the timely adjudication of elections in Alaska. The Alaska Supreme Court needs direction from the United States Supreme Court. See Court Opinion 4368, O'Callaghan v. State of Alaska, Hickel, Coghill, Campbell, issued July 5, 1996 in conjunction with O'Callaghan v. State, 826 P.2d 1132 (Alaska), cert. denied, 506 US 860 (1992). Also, the Alaska Supreme Court allowed the 1992 primary to pass while denying motions for expedited consideration. They allowed an election they knew was illegal to pass without a ruling.

In O'Callaghan's view, there was no effort by the Alaskan courts to make voters "whole." In ordering legal elections, the Alaska Supreme Court merely ordered the obvious. The State of Alaska, Division of Elections having

done illegal acts, needs to be punished for these illegal activity. O'Callaghan's motion to amend remedy filed October 14, 1993, granted November 8, 1993, proposed $50.00 be paid to primary voters, $50.00 for general election voters, and those who voted in both elections be paid $150.00 for having been given an illegal ballot. The Alaska Supreme Court denied any remedy. The issues of accuracy, timeliness and remedy need a finality the state courts appear to be unable to provide. I pray that the Supreme Court of the United States hear this case and make the voters of Alaska whole again by mandating accuracy, timeliness and remedy.

Respectfully submitted,

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July 5, 1996